

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 602

WALKER PROCESS EQUIPMENT, INC., PETITIONER

v.

FOOD MACHINERY AND CHEMICAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF THE PETITION FOR CERTIORARI**

The principal issue in this case is whether a person injured in his business by a competitor's possession and enforcement of a patent obtained by fraud on the Patent Office may maintain an action for treble damages under the antitrust laws, on the theory that such conduct constitutes monopolization in violation of Section 2 of the Sherman Act.¹ The Seventh Circuit held that a counterclaim based on that theory

¹ Petitioner also asks this Court to decide, in its third question presented, whether the prevailing party in an infringement action brought on a fraudulently procured patent can recover attorney's fees under 35 U.S.C. 285 (Pet. 2, 12-14). We express no view on this question.

does not state a claim upon which relief can be granted, since only the United States can bring an action to annul a patent on the ground of fraud. (335 F. 2d 315, 316; Pet. 2a, 3a).

The decision thus raises important questions that ought to be reviewed by this Court. Although there is no evidence accurately revealing how often fraud has been practiced by patentees in procuring the issuance of a patent, there is concern that this is a significant recurring problem.² Such frauds prejudice the public and seriously restrict a free competitive economy, not only because of the direct suppression of competition resulting from threatened and actual suits for infringement, but also because patents are frequently the basis for agreements between competitors such as assignments and licenses. The Patent Office has only limited facilities for investigating the

² A recent report of a Senate Subcommittee on Patents, Trademarks, and Copyrights expressed concern about fraud and other unfairness in proceedings before the Patent Office. S. Rep. No. 97, 86th Cong., 1st Sess., pp. 6-9. Last year the Federal Trade Commission dealt with widespread restraints upon competition in an important industry traceable to a patent obtained through misrepresentations and deliberate withholding of material information from a patent examiner. *American Cyanamid Co.*, 3 Trade Reg. Rep. ¶ 16,527 (Dkt. No. 7211). See also, Cullen & Vickers, *Fraud in the Procurement of a Patent*, 29 Geo. Wash. L. Rev. 110; Keaveney, *Fraud in the Procurement of a Patent as a Defense to Infringement*, 23 J. Pat. Off. Soc'y 482. Cf. H. Rep. No. 1983, 87th Cong., 2d Sess., pp. 1, 4, on Public Law 87-831, 76 Stat. 958, which requires that settlements of patent interference proceedings be filed with the Patent Office.

representations made by applicants and has no authority to annul a patent after it is issued. The Department of Justice seldom learns of such incidents in a way that enables it to act effectively. A decision holding that one who has suffered damage as a result of the suppression of competition under an invalid patent procured by fraud may maintain an antitrust action charging illegal monopolization would be an important complement to governmental action; for such a private remedy would bring to light frauds which now pass undiscovered. It would also discourage misrepresentation to the Patent Office, and infringement suits upon patents thus obtained.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted with respect to the first and second questions presented.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.